

Jennifer Stisa Granick, Esq. (CA Bar No. 168423)
 ZWILLINGER GENETSKI LLP
 1705 N Street, NW
 Washington, D.C. 20036
 Phone: (202) 296-3585
 Fax: (202) 706-5298
 jennifer@zwillgen.com

Attorneys for Defendant Yahoo! Inc.

UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

FAYELYNN SAMS, Individually,
 and on behalf of a class of all others
 similarly situated,

Plaintiffs,

v.

YAHOO! INC.,

Defendant.

) Case No. 3:10-CV-05897-TEH
)
) **DEFENDANT YAHOO! INC.'S**
) **AMENDED NOTICE OF**
) **MOTION AND MOTION TO**
) **DISMISS PURSUANT TO FED.**
) **R. CIV. P. 12(b)(6) AND**
) **MEMORANDUM OF POINTS**
) **AND AUTHORITIES IN**
) **SUPPORT.**

) Date: March 7, 2011
) Time: 10:00am
) Dep't: Hon. Thelton Henderson
)

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on March 7, 2011 at 10:00 a.m., in Courtroom 12 of the Northern District of California, located at 450 Golden Gate Avenue, 19th Floor, San Francisco, California, Defendant Yahoo! Inc. ("Yahoo!") will, and hereby does move to dismiss the First Amended Complaint (Dkt. 13) with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6). This motion is based on this Notice of Motion and Motion, the accompanying Memorandum in support thereof, and such further and additional arguments and papers that may be presented to the Court at or before the hearing on this motion.

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Case No. 3:10-CV-05897-TEH
Amended Motion to Dismiss and Memorandum in Support by Defendant Yahoo!, Inc.

MEMORANDUM OF POINTS AND AUTHORITIES

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1 I. **INTRODUCTION**

2 Plaintiff Fayelynn Sams' complaint challenging Yahoo!'s production of subscriber
3 information in response to two valid state Grand Jury subpoenas should be dismissed
4 because: (a) Yahoo! has complete immunity for any and all claims arising under federal or
5 state law for providing user information in response to grand jury subpoenas and warrants
6 regardless of how they are served; and, (b) Yahoo!'s contract with its users expressly
7 contemplates the types of disclosures at issue. Accordingly, this Court should dismiss Plaintiff's
8 complaint pursuant to Fed. R. Civ. P. 12(b)(6) because it fails to state a claim.

9 Sams' complaint in this case fails in light of the key immunity provision in the
10 Stored Communications Act ("SCA"), 18 U.S.C. § 2703(e), which grants Yahoo! complete
11 immunity for compliance with valid court orders, warrants, or subpoenas. Sams does not
12 dispute that the subpoenas were validly issued, only that they were improperly served. This
13 entire dispute, therefore, is about whether accepting state grand jury subpoenas by fax rather
14 than insisting on personal service voids an ISP's absolute immunity under federal law. Of
15 course, as a matter of law, it does not. Further, the complaint also should be dismissed
16 because it contains no allegations that overcome Yahoo!'s immunity under the good faith
17 reliance provision contained in 18 U.S.C. § 2707(e). If service by fax is invalid under
18 Georgia law even when the recipient waives service, Yahoo! is still entitled to good faith
19 immunity for responding to the subpoenas. Plaintiff's claims under Cal. Bus. & Prof. Code
20 §§ 17200 & 17500 also fail because she has not alleged actual reliance on the alleged
21 misstatements, the alleged misstatements and practices are not unfair, unlawful, or
22 fraudulent, the alleged practices and misstatements are not the "but for" cause of Plaintiff's
23 alleged injury, and Plaintiff has not lost "money or property" as a result of Yahoo!'s alleged
24 actions. Lastly, Plaintiff's state law claims for breach of contract, as well as claims under
25 Cal. Bus. Prof. Code §§ 17200 & 17500 are contrary to the express terms of her agreement
26 with Yahoo! and therefore barred as a matter of law.

II. PROCEDURAL HISTORY

Plaintiff Fayelynn Sams (“Sams” or “Plaintiff”) filed her class action complaint in the Superior Court of Fulton County for the State of Georgia on September 28, 2010. Plaintiff served Yahoo!’s agent in Georgia on September 29, 2010. (Dkt. 1, Ex. A). Yahoo! removed the case to the Northern District of Georgia on October 28, 2010, and filed a motion to dismiss the complaint on November 4, 2011 for failure to state a claim and for improper venue. (Dkt. 4). On November 22, 2010, the parties filed a consent motion to extend Plaintiff’s deadlines to respond to Defendant’s motion to dismiss, and provided that no response was required if Plaintiff filed an amended complaint. (Dkt. 12). On November 26, 2010, Plaintiff filed a first amended complaint, which contained substantially the same allegations but added two causes of action under California law for unfair trade practices. (Dkt. 13). The same day, Plaintiff filed a motion to transfer the case to the Northern District of California. (Dkt. 14). On December 10, 2010, Yahoo! responded to that motion to transfer, reiterating that the amended complaint should be dismissed pursuant to the grounds asserted in its first motion to dismiss, but agreed that transfer to the Northern District of California was one appropriate remedy in light of Yahoo!’s terms of service. (Dkt. 17).

Also on December 10, 2010, both parties filed a consent motion to stay all deadlines in this case until a ruling on the motion to transfer was issued. The consent motion contemplated that if the motion was denied, Yahoo! would have 14 days to file its motion to dismiss the amended complaint. It did not specify the deadline for the filing of the Motion to Dismiss following any transfer of the case. The United States District Court never entered the consent motion, but ordered the case transferred on December 20, 2010. Pursuant to that order, the case was terminated in the Northern District of Georgia on December 20, 2010. The case was then re-filed by virtue of transfer in the Northern District of California on December 27, 2010, and counsel for Yahoo! discovered on its own accord that transfer was complete when the transfer appeared on ECF/Pacer on December 29, 2010.

Accordingly, no briefing schedule has yet been set for the filing of the Motion to Dismiss following the transfer. However, 14 days following the re-filing of the case is January 10, 2011. Accordingly, Yahoo!'s motion is timely.

III. FACTUAL ALLEGATIONS¹

Yahoo! is an international Internet company with a large network of properties and services that it offers to over 500 million users worldwide, many of which (for example, email) are offered for free. (Plaintiff's First Amended Complaint ("Compl.") ¶ 9.) Plaintiff has or had a free email account(s) with Yahoo!. (*Id.*) Plaintiff complains because Yahoo! provided unspecified user data to law enforcement in response to grand jury subpoenas issued by the District Attorney's office for Lowndes County, Georgia on or about December 2, 2008. (*Id.* at ¶ 5.)

As the subpoenas indicate, both were propounded to Yahoo! by a Chief Assistant District Attorney for the Southern Judicial Circuit and were signed by the Lowndes County Clerk of Court. (Yahoo!'s First Motion to Dismiss, Dkt. 5, Ex. B at 2, Ex. C at 2).² Both

¹ Only the well pleaded factual allegations are accepted as true for purposes of this Motion to Dismiss. Except as expressly stated herein, Yahoo! does not admit the factual allegations contained in Plaintiff's Complaint.

² This Court may consider the actual Grand Jury subpoenas served upon Yahoo! as well as Yahoo!'s TOS when examining this motion to dismiss because the Complaint refers to and clearly is based upon them, they are material to Plaintiff's allegations, and their authenticity is not subject to reasonable dispute. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (in ruling on a motion to dismiss for failure to state a claim "[a] court may consider evidence on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion"); *see also Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007) ("Review is generally limited to the contents of the complaint, but a court can consider a document on which the complaint relies if the document is central to the plaintiff's claim, and no party questions the authenticity of the document.") "Moreover, a court 'need not accept as true allegations contradicting documents that are referenced in the complaint or that are properly subject to judicial notice.'" *Anderson v. Fishback*, No. CV-05-0729-ROS (PC), 2009 WL 2423327, *2 (E.D. Cal. Aug. 2, 2009) (quoting *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008)). While not attached to the complaint, the TOS's authenticity is also not subject to reasonable dispute. The TOS is available at <http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html> (Yahoo!'s Motion to Dismiss, Dkt. 5, Ex. A.)

subpoenas were transmitted to Yahoo! via facsimile from the District Attorney's Office in Valdosta, Georgia. (Dkt. 5, Ex. B at 2, Ex. C at 2). The first subpoena required production of subscriber information for the Yahoo! ID lynnsams or lynnsams@yahoo.com, including "name and address, date account created, account status, Yahoo! E-mail address, alternate e-mail address, registration from IP, date IP registered and login IP address associated with session time and dates" in November of 2008. (Dkt. 5, Ex. B at 3.) The second subpoena required production of "[a]ny and all I.P. login tracker for 'lynnsams' or 'lynnsams@yahoo.com'" for dates in December 2008. (Dkt. 5, Ex. C at 3.) Both subpoenas required that Yahoo! not reveal the existence of the subpoena to the subscriber. (Dkt. 5, Ex. B at 3, Ex. C at 3).

The Complaint fails to mention or file with the Court the binding written contract between Yahoo! and Sams, the TOS, and instead only alleges portions of the Yahoo! Privacy Policy incorporated by reference. As the attached screenshot demonstrates, in order to register for a Yahoo! account, Ms. Sams (and all Yahoo! users) must first indicate their acceptance of Yahoo!'s TOS. (Dkt. 5, Ex. D, Screenshot of Yahoo! Registration Process).

The express provisions of the TOS foreclose the claims here:

You acknowledge, consent and agree that Yahoo! may access, preserve and **disclose your account information and Content if required to do so by law or in a good faith belief that such access preservation or disclosure is reasonably necessary to: (i) comply with legal process; (ii) enforce the TOS; (iii) respond to claims that any Content violates the rights of third parties; (iv) respond to your requests for customer service; or (v) protect the rights, property or personal safety of Yahoo!, its users and the public.**

(Dkt. 5, Ex. C ¶ 6 (emphasis added).) Plaintiff alleges that Yahoo! breached the Privacy Policy by "unlawfully accepting as valid legal process subpoenas or warrants faxed from outside California. (Compl. ¶ 151.) Plaintiff, of course, did not allege that the Grand Jury subpoenas were not issued by valid law enforcement agencies, that they lacked signatures (or other indicia of authenticity), or that a reasonable person would believe that the

subpoenas or warrants were false. (*See, e.g.*, Compl. ¶¶ 31-33 (improper service only alleged defect.)) Plaintiff's key omissions are fatal to her claims as they do nothing to suggest that Yahoo! is not immune under federal law.

Similarly, Plaintiff's allegations related to the incorporated Privacy Policy do not save her claim. (Compl. ¶¶ 11.) The Privacy Policy provides:

We respond to subpoenas, court orders, or legal process, or to establish or exercise our legal rights or defend against legal claims.

We believe it is necessary to share information in order to investigate, prevent, or take action regarding illegal activities, suspected fraud, situations involving potential threats to the physical safety of any person, violations of Yahoo!'s terms of use, or as otherwise required by law.

(Ex. A to Compl., *see* Compl. ¶ 11.) Plaintiff's assertion that the above statement constitutes a "claim" by Yahoo! that it "conform[s] with the strict requirements of the applicable federal statutes when releasing personal and private user information and data..." is a fanciful interpretation of the agreement at odds with its express terms and, as described above, with Yahoo!'s TOS. (Compl. ¶ 13) The TOS and the Privacy Policy make it clear that Yahoo! may respond to valid law enforcement requests where it has a good faith belief that disclosure is necessary to comply with legal process. Plaintiff does not contest that the subpoenas were properly issued by law enforcement, only that Yahoo! violated the SCA by accepting and responding to such process by fax.

IV. STANDARD OF REVIEW

Under Fed. R. Civ. P. 12(b)(6), a court should grant a motion to dismiss where the plaintiff is unable to articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 556). Where, as here, federal

1 statutory immunity bars all of Plaintiff's claims, and further amendment is futile, the Court
 2 should dismiss without leave to amend as a matter of law. *See, e.g., Lopez v. Smith*, 203
 3 F.3d 1122, 1127 (9th Cir. 2000) (leave to amend need not be allowed where amendment
 4 would be futile)

5 **V. YAHOO!'S IMMUNITY UNDER THE STORED COMMUNICATIONS**
 6 **ACT MANDATES THAT PLAINTIFF'S CLAIMS BE DISMISSED WITH**
 7 **PREJUDICE.**

8 **A. The SCA's Two Immunity Provisions Bar Plaintiff's Claims**

9 The SCA, 18 U.S.C. §§ 2701 *et seq.*, contains two separate immunity provisions:
 10 (1) 18 U.S.C. § 2703(e), which provides complete immunity to any provider of wire or
 11 electronic communications service for compliance "with the terms of a court order, warrant,
 12 subpoena, statutory authorization, or certification under this chapter;" and (2) 18 U.S.C. §
 13 2707(e), which provides a defense for a provider *even if* a defendant exceeds the terms of
 14 the subpoena and produces information not called for by the subpoena so long as the
 15 provider responds in good faith. *See United States v. Councilman*, 418 F.3d 67, 83-84 &
 16 n.16 (1st Cir. 2005) (analyzing identical immunity provision under the Wiretap Act 18
 17 U.S.C. § 2520(d)).³ Section 2703(e) is the basic immunity provision, and Section 2707(e)
 18 provides for additional immunity if the legal process later turns out to be deficient or if it
 19 requires production of information not allowed under the SCA as long as the provider acts
 20 in good faith.

21 As set forth below, § 2703(e) immunity applies to this case where Yahoo! complied
 22 with the terms of two grand jury subpoenas, and § 2707(e) immunity also applies because
 23 Plaintiff lacks standing to contest Yahoo!'s decision to waive formal service requirements,

24 ³ Thus, there are actually three immunity provisions in the Electronic Communications
 25 Privacy Act ("ECPA") if the immunity provision in the Wiretap Act for interceptions and
 26 disclosures under that statute is included. *See* 18 U.S.C. § 2520(d). That immunity
 27 parallels immunity under § 2707(e) and would apply to any claim that Yahoo! violated the
 28 Wiretap Act.

1 and such a decision does not undermine Yahoo!'s good faith.

2 1. Section 2703(e) of the SCA Bars Plaintiffs Claims

3 Section 2703(e) provides that a provider is immune from suit if it complies with the
4 terms of a valid court order, warrant, subpoena, statutory authorization, or certification:

5 **No cause of action against a provider disclosing information**
6 **under this chapter.** — No cause of action shall lie in any court
7 against any provider of wire or electronic communication service,
8 its officers, employees, agents, or other specified persons for
9 providing information, facilities, or assistance in accordance with
10 the terms of a court order, warrant, subpoena, statutory
11 authorization, or certification under this chapter.

12 18 U.S.C. § 2703(e).

13 Although Plaintiff wholly ignores Section 2703(e), she cannot allege that Yahoo! is
14 not a provider of wire or electronic communication service, or that its employees provided
15 information other than in accordance with a court order, warrant, subpoena, statutory
16 authorization, or certification within the meaning of the section. Instead, she only alleges
17 that the manner in which the grand jury subpoenas were served is improper, arguing that
18 Yahoo! is not entitled to immunity because it did not insist upon personal service in
19 Georgia. The decision not to object to improper service, however, is not a basis to override
20 Yahoo!'s clear statutory immunity.

21 The court in *Booker v. Dominion Virginia Power*, No. 3:09-cv-759, 2010 WL
22 1848474 (E.D. Va. May 7, 2010), considered and rejected the identical claim Plaintiff raises
23 here. In *Booker*, the plaintiff brought invasion of privacy claims against a power company
24 and a telecommunications provider based upon acceptance of subpoenas via facsimile.
25 Rejecting those claims, the court stated that “the right to insist on service by a particular
26 means is a right personal to [the recipient of a subpoena] that [Plaintiff] lacks standing to
27 challenge.” *Id.* at *5. The *Booker* court specifically found that the immunity provided
28 under 18 U.S.C. § 2703(e) “bars any cause of action against a ... provider for providing

information in response to a subpoena.” *Id.* at *7.⁴ As in this case, the only allegation in *Booker* was that service was improper—not that the subpoenas themselves were defective. Sams does not allege that Yahoo! acted beyond the scope of the subpoenas, that Yahoo! provided more information than requested by the subpoenas, that the subpoenas were not actually issued by duly authorized law enforcement officials or that they were not genuine. Accordingly, as in *Booker*, this Court should reject the claim based on improper service by fax and dismiss this case under Section 2703(e).

2. Section 2707(e) of the SCA and Section 2520(e) of the Wiretap Act Bar Plaintiff’s Claims

Even if § 2703(e)’s immunity provision were inapplicable, Section 2707(e) would nevertheless provide a complete defense to Plaintiff’s claims. Section 2707(e) states that a provider is entitled to immunity if it demonstrates:

A good faith reliance on—

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization (including a request of a governmental entity under section 2703(f) of this title);

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of[.] Though, for the reasons stated below, Plaintiff lacks standing to bring claims under the Wiretap Act, 18 U.S.C. § 2520(e) also provides an identical good faith defense to 2707(e).

A good faith defense may be shown where a defendant “can demonstrate (1) that he

⁴ The Complaint also alleges that Yahoo! produced materials “voluntarily” by providing them to law enforcement in advance of a court date in order to avoid travelling to Georgia. (*See e.g.* Compl. ¶ 26). Plaintiff, however, provides no indication that the subpoena itself was invalid or that Yahoo! would not have been required to produce the documents if it had travelled to Georgia. Yahoo!’s is not required to travel to Georgia merely to deliver documents, and thus advance production of the documents does not render these immunity provisions invalid.

1 had a subjective good faith belief that he acted legally pursuant to a court order; and (2) that
 2 this belief was reasonable.” *Freedman v. Am. Online, Inc.*, 325 F. Supp. 2d 638, 648 (E.D.
 3 Va. 2004) (quoting *Jacobson v. Rose*, 592 F.2d 515, 523 (9th Cir.1978)); *see also In re*
 4 *Application of the United States for a Nunc Pro Tunc Order for Disclosure of Telecomms.*
 5 *Records*, 352 F. Supp. 2d 45, 47 (D. Mass. 2005) (provider is entitled to immunity for
 6 complying with a request for an emergency production of records pursuant to 18 U.S.C §
 7 2702(c)(4)); *Jayne v. Sprint PCS*, No. CIV S-07-2522 LKK GGH P, 2009 WL 426117 at
 8 *7 (E.D. Cal. Feb. 20, 2009) (provider entitled to dismissal with prejudice for compliance
 9 with request for emergency production)).

10 Plaintiff alleges nothing to demonstrate that Yahoo! lacked a good faith belief that
 11 it acted lawfully in response to legal process. In *McCready v. eBay, Inc.*, 453 F.3d 882 (7th
 12 Cir. 2006), the Seventh Circuit addressed the 2707(e) good faith defense and held that the
 13 provider was entitled to immunity where it had no reason to believe a subpoena was
 14 “phony.” *Id.* at 892.⁵ In so holding, the Court noted that the subpoena had been issued by a
 15 federal district court, quoted the applicable federal rules correctly, and was received by
 16 mail.

17 As in *McCready*, the subpoenas at issue contained no indicia supporting a
 18 reasonable interpretation that they were “phony.” The subpoenas were issued by state
 19 courts and Plaintiff alleges no facial defects, just that they were received by facsimile.

20 _____
 21 ⁵ The legislative history comports with this interpretation of the Seventh Circuit’s reasoning.
 22 The Senate report accompanying the adoption of the identical immunity provision in 18
 23 U.S.C. § 2520 provisions makes clear what a complaint must allege to avoid this bar:

24 The complaint must allege that a wire or electronic communications service provider
 25 (or one of its employees) ... (b) acted without a facially valid court order or
 26 certification; (c) acted beyond the scope of a court order or certification; or (d) acted
 27 on bad faith. Acting in bad faith would include failing to read the order or collusion.
 28 If the complaint fails to make any of these allegations, the defendant can move to
 dismiss the complaint for failure to state a claim upon which relief can be granted.

S. Rep. No. 99-541, at 26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 2580.

1 Yahoo!, however, regularly accepts valid subpoenas by facsimile and there was nothing
 2 about that method of service that would indicate the valid subpoenas were not legitimate. In
 3 fact, the facsimile transmissions all support the view that the grand jury subpoenas were
 4 genuine. The facsimile cover sheets indicate that the District Attorney of the Southern
 5 Judicial Circuit (J. David Miller) caused them to be issued (Ex. B at 1, Ex. C at 1). The
 6 facsimile transmission stamp also indicated that it came from the District Attorney's office.
 7 (*Id.*) The number from which the valid subpoenas were transmitted matches the number on
 8 the printed letterhead from the District Attorney's office. (*Id.*) Moreover, Yahoo!'s
 9 response to the first valid subpoena was received by the proper office and the response
 10 caused law enforcement to respond with additional process. (Ex. C). Even today (two
 11 years later), an Internet search of that facsimile number shows that it corresponds to the
 12 District Attorney's office in Valdosta, Georgia.⁶ Lastly, the subpoenas contain the signature
 13 of Sara L. Crow, the Clerk of Superior Court in Lowndes County, Georgia. (Ex. B. at 3, Ex.
 14 C at 3). Accordingly, while Plaintiff complains only of the manner of service, there was no
 15 reasonable basis for Yahoo! to believe the valid subpoena was not what it purported to be –
 16 and was –a lawful subpoena issued at the request of the District Attorney.

17 **VI. PLAINTIFF CANNOT CONTEST YAHOO!'S DECISION TO WAIVE**
 18 **RIGHTS PERSONAL TO YAHOO!.**

19 Only Yahoo! can object to or contest the method of service used by the government.
 20 As the one court has explained, “any defect in the method of service employed here
 21 threatens only the rights of the served party Accordingly, [Plaintiff] lacks standing to
 22 object to the method of service employed.” *Ribbens Int'l, S.A. de C.V. v. Transp. Int'l Pool,*
 23 *Inc.*, 45 F. Supp. 2d 982, 984 (C.D. Cal. 1999).⁷ Indeed, “[t]he rules of service ... are

24 ⁶ See <http://www.southernjudicialcircuit.com/sodr.htm>

25 ⁷ Cf. *United States v. Tomison*, 969 F. Supp. 587, 596 (E.D. Cal.1997) (Government lacks
 26 standing to move to quash subpoena served on third party as “unreasonable or oppressive”
 27 because “the government lacks the sine qua non of standing, an injury in fact relative to
 28 th[e] grounds [for the proposed challenge].”); *United States v. Evans*, 574 F.2d 1287, 1288

designed to protect the *served* party's rights and interests and any defect in service must be complained of by the *served* party, or not at all.” *Id.* (emphasis added).⁸ Similarly, courts in this Circuit have also recognized the personal nature of certain rights relating to the service of subpoenas in other contexts, holding that a party lacks standing to challenge valid subpoenas served on another “on the grounds of oppression and undue burden placed upon the third parties where the non-parties have not objected on those grounds.” *Auto-Owners Ins. Co. v. Se. Floating Docks, Inc.*, 231 F.R.D. 426, 429 (M.D. Fla. 2005).⁹ Rules regarding service of process are thus intended to protect only the *recipient* of the process, not the individual whose records are sought.

Georgia law does not change this analysis or provide Plaintiff with a means to challenge service of process. The valid subpoena in this case was issued pursuant to O.C.G.A. § 17-7-190 which does not provide Plaintiff with a means of challenging service. Like the federal statute authorizing the issuance of an administrative subpoena in *Booker*, there is no provision in Georgia law that provides a plaintiff with an express right to challenge a grand jury subpoena issued to a third party based on improper service. As such, Plaintiff cannot challenge the alleged defects in service of process. In fact, Yahoo! would be in no position to insist on proper service because it has previously communicated to state and local law enforcement that it is willing to waive service and accept service by fax for

(5th Cir. 1978) (“Evans lacks standing to object that records admitted at his trial were obtained from his employer through an administrative summons rather than by subpoena or search warrant.”).

⁸ See *United States v. Viltrakis*, 108 F.3d 1159, 1160-61 (9th Cir. 1997) (collecting decisions that “turn on the principle that the person served with process is the proper party to allege error”); *Windsor v. Martindale*, 175 F.R.D. 665, 668 (D. Col. 1997) (defendant lacks standing to move to quash third-party subpoena on grounds of defective service).

⁹ See also 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice And Procedure Civil* 2D § 2035 (“A party may not ask for an order to protect the rights of another party or a witness if that party or witness does not claim protection for himself, but a party may seek an order if it believes its own interest is jeopardized by discovery sought from a third person.”)

1 subpoenas from state and local law enforcement seeking documents only (and not
2 testimony).

3 Plaintiff also alleges that warrants and valid subpoenas have no effect outside the
4 jurisdiction where they are issued. (Compl. ¶ 14, 17.) But, as is the case with service of
5 process, Yahoo!'s right to assert a defense for lack of personal jurisdiction is a right
6 personal to it, and as such may be waived in the same way as Yahoo!'s right to insist on
7 service of process. *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S.
8 694, 703 (1982) (The right to insist on personal jurisdiction is "first of all an individual
9 right" and "it can, like other such rights, be waived"); *Ruhrgas AG v. Marathon Oil Co.*,
10 526 U.S. 574, 584 (1999) ("[A] party may insist that the limitation be observed, or he may
11 forgo that right, effectively consenting to the court's exercise of adjudicatory authority.").¹⁰

12 In addition to Yahoo!'s ability to waive a personal jurisdiction defense, Yahoo! may
13 well be subject to jurisdiction in most states, including Georgia, at least for the purpose of
14 providing responses to Grand Jury subpoenas and warrants seeking information related to
15 local subscribers. As such, many of the objections to jurisdiction that Plaintiff argues
16 Yahoo! should have raised would have been futile, and in all cases would have significantly
17 increased Yahoo!'s costs. Indeed, by initially filing this Complaint in Georgia, Plaintiff
18 assumed that Georgia courts had personal jurisdiction over Yahoo!. As with the Grand Jury
19 subpoenas, it is up to Yahoo! and Yahoo! alone to decide whether it will contest
20 jurisdiction.

21 **VII. PLAINTIFF FAILS TO STATE A CLAIM FOR BREACH OF**
22 **CONTRACT OR BREACH OF THE IMPLIED DUTY OF GOOD FAITH**
23 **AND FAIR DEALING**

24 Courts routinely uphold online click through agreements,¹¹ including forum

25 ¹⁰ See also Cal. Penal Code § 1524.2(c), which states that electronic communications
26 services in California must accept out of state warrants as if those warrants were issued by a
27 California court.

28 ¹¹ See, e.g., *Specht v. Netscape Commc'ns. Corp.*, 306 F.3d 17, 22 n. 4 (2d Cir. 2002);

1 selection clauses, regardless of whether plaintiffs alleged that they have read the terms,
 2 where assent is a prerequisite for installing software or using a service.¹² Yahoo!'s TOS
 3 and Privacy Policy permit Yahoo! to produce documents in response to facially valid legal
 4 process, without requiring it to first contest personal jurisdiction or proper service in every
 5 forum:

6 You acknowledge, consent and agree that Yahoo! may access,
 7 preserve and disclose your account information and Content if
 8 required to do so by law or in a good faith belief that such access
 9 preservation or disclosure is reasonably necessary to: (i) comply
 10 with legal process; (ii) enforce the TOS; (iii) respond to claims that
 11 any Content violates the rights of third parties; (iv) respond to your
 12 requests for customer service; or (v) protect the rights, property or
 13 personal safety of Yahoo!, its users and the public.

14 (Ex. A at ¶ 6.) The TOS unambiguously states that users *consent* to the production of
 15 information when Yahoo! is required to do so by law or when Yahoo! believes that
 16 disclosure is *reasonably necessary* to comply with legal process. There is no indication that
 17 Yahoo! contractually agreed to assert any particular defenses to legal process or to insist on
 18 personal service of subpoenas. In fact, Plaintiff's allegation that Yahoo! "claims to conform
 19

20 *DeJohn v. The. TV Corp. Int'l*, 245 F. Supp. 2d 913, 921 (N.D. Ill. 2003); *Guadagno v.*
 21 *E*Trade Bank*, 592 F.Supp.2d 1263, 1271 (C.D. Cal.2008) (explaining that a party may be
 22 bound by a 'clickwrap' agreement if the terms are clear and acceptance is unambiguous,
 23 regardless of whether he actually reads them); *Inter-Mark USA, Inc. v. Intuit, Inc.*, No. c-
 24 07-04178, 2008 WL 552482, *9 (N.D. Cal. Feb. 27, 2008) (enforcing click-wrap
 25 agreement). *See also ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996)
 26 (upholding the enforceability of "shrinkwrap" agreements contained inside boxed and sold
 27 computer software).

28 ¹² *See Burcham v. Expedia, Inc.*, No. 4:07CV1963 CDP, 2009 WL 586513 at *2 (E.D. Mo.
 Mar. 6, 2009); *Recursion Software, Inc. v. Interactive Intelligence, Inc.*, 425 F. Supp. 2d
 756, 783 (N.D. Tex. 2006) (noting that where installation of software without assent to
 terms is impossible, claim that plaintiff did not see or read terms is without merit.); *see also*
Imageline, Inc. v. Fotolia LLC, 663 F. Supp. 2d 1367, 1379 (N.D. Ga. 2009) (upholding a
 forum selection clause in a "click-wrap" agreement in determining that the court did not
 have personal jurisdiction over defendant); *Hughes v. McMenamon*, 204 F. Supp. 2d 178,
 180-81 (D. Mass. 2002) (upholding forum selection clause in email TOS); *Forrest v.*
Verizon CommComm's, Inc., 805 A. 2d 1007, 1010 (D.C. 2002) (enforcing forum
 selection clause found in final section of on-line terms and conditions available for review
 in on-line scroll box).

with the strict requirements of the applicable federal statutes” is consistent only with an interpretation that Yahoo! will, in fact, comply with the SCA and the Wiretap Act—neither of which require Yahoo! to assert the personal defense of improper service of process or lack of personal jurisdiction. (Compl. ¶ 16). As such, the immunity provisions in the SCA and the Wiretap Act also preclude Plaintiff’s breach of contract claims.

VIII. PLAINTIFF’S CLAIMS UNDER CAL. BUS. & PROF. CODE §§ 17200 & 17500 MUST FAIL

In addition to being barred by the SCA’s immunity provisions, Plaintiff fails to state a claim under the California Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200, or California’s False Advertising Law (“FAL”), Cal. Bus. & Prof. Code § 17500.¹³ For both the FAL and UCL claims premised on fraud, Plaintiffs must allege that they *relied* on the alleged omission or misstatements such that the failure to disclose the allegedly fraudulent or false practices to users is the “but for” cause of a legally cognizable injury. *In re Tobacco II Cases*, 46 Cal.4th 298, 327-28 (2009); *see also Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp. 2d 939, 947 (S.D. Cal. 2007) (plaintiffs must plead actual reliance); *Laster v. T-Mobile USA Inc.*, 407 F. Supp. 2d 1181, 1194 (S.D. Cal. 2005) (holding that plaintiffs must allege that they “actually relied on” challenged statements to adequately allege causation) *aff’d*, 252 Fed. Appx. 777 (9th Cir. 2007). Moreover, boilerplate allegations that the plaintiff suffered injury in fact and has lost money and/or property as a result of fraudulent, unfair, and/or unlawful trade practices are insufficient to support UCL and FAL claims. *See Khoury v. Maly’s of Cal., Inc.*, 17 Cal. Rptr. 2d 708, 712 (Cal. Ct. App. 1993) (“A plaintiff alleging unfair business practices under these statutes must state with reasonable particularity the facts supporting the statutory elements of the violation.”).

¹³ Plaintiff also fails to state a claim for “Public Disclosure” of private facts for the same reason and such claims are similarly barred by the SCA. Yahoo! only disclosed the allegedly private facts in compliance with the SCA, and as such Plaintiff’s claims for Public Disclosure of Private Facts are also barred. *See e.g. Stern v. Great Western Bank*, 959 F. Supp. 478 (N.D. Ill. 1997).

1 Additionally, in this Circuit, Appellants must meet the heightened pleading requirements
 2 under Fed. R. Civ. P. 9(b) to sustain non-disclosure claims under the UCL and CLRA.
 3 *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125-27 (9th Cir. 2009). Finally, the UCL and
 4 FAL standing requirements are more stringent because Proposition 64 added the additional
 5 requirement that plaintiff must have “lost money or property” in order to sue — *i.e.*,
 6 plaintiff’s “injury in fact” must involve “lost money or property.” *In re Tobacco II Cases*,
 7 46 Cal. 4th at 329.¹⁴

8 Plaintiff’s allegations do not demonstrate that the practices complained of were
 9 unlawful, fraudulent, or unfair. The alleged practices are not unlawful, because, as stated
 10 above, Yahoo!’s production of Plaintiff’s data was done in compliance with the SCA.¹⁵ The
 11 alleged practices are not fraudulent under the UCL nor false advertising under the FAL
 12 because, not only did the SCA permit such disclosures, but the Terms of Service provided
 13 users with clear advance notice that their data may be provided in response to law
 14 enforcement request. *See* Section 0, *supra*.

15 Nor are the practices unfair. Under California law, to show “unfairness” in a
 16 consumer case under the UCL, (1) the consumer injury must be substantial; (2) the injury
 17 must not be outweighed by any countervailing benefits to consumers or competition; and (3)
 18 it must be an injury that consumers themselves could not reasonably have avoided.
 19 *Camacho v. Auto. Club of S. California*, 142 Cal. App. 4th 1394, 1403 (2006). Plaintiff has
 20 not alleged any of these three prongs. No substantial injury is alleged. And any injury at all
 21

22 ¹⁴ As Yahoo!’s terms of service make clear, a Plaintiff’s communications stored on
 23 Yahoo!’s server are not money or property which a Plaintiff could “lose” through disclosure.
 24 Furthermore, Plaintiff does not allege that she was fraudulently induced to pay any money
 25 for Yahoo!’s services—nor can she, as those are offered for free.

26 ¹⁵ “A plaintiff may thus not ‘plead around’ an ‘absolute bar to relief’ simply ‘by recasting
 27 the cause of action as one for unfair competition.’” *Cel-Tech Communications, Inc. v. Los*
 28 *Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 182, 973 P.2d 527, 541 (1999) (quoting
Manufacturers Life Ins. Co. v. Superior Court, 10 Cal.4th 257, 283 (1995)).

1 caused by Yahoo!’s decision not to insist on personal service does not outweigh the
2 substantial benefit of a Nationwide free email service. And finally, the alleged injury is not
3 unavoidable: as stated above Yahoo! clearly discloses its policies with regard to disclosure
4 to law enforcement in its terms of service.

5 There is no allegation in the complaint that Yahoo!’s practices with regard to
6 responses to legal process were material to Plaintiff’s decision to use the service such that
7 she actually relied on them when registering for Yahoo!’s services. *In re Tobacco II Cases*,
8 46 Cal.4th 298, 327-28 (2009). Furthermore, there is no allegation that Yahoo!’s practices
9 were the “but for” cause of the alleged injury: the disclosure of Plaintiff’s personal
10 information. (Compl. ¶¶ 122, 128). Plaintiff has not, and cannot allege, that but for
11 Yahoo!’s refusal to insist on a particular method of service of process Plaintiff’s personal
12 data would not have been disclosed. To the contrary, all of the process at issue in this case
13 was valid and Plaintiff makes no allegation that Georgia law enforcement *could not* have
14 served the process on Yahoo!’s agent in Georgia.

15 **IX. PLAINTIFF LACKS STANDING TO BRING ANY CLAIMS BASED ON**
16 **IMPROPER COMPLIANCE WITH A WARRANT OR IMPROPER**
DISCLOSURE OF THE CONTENTS OF COMMUNICATIONS

17 Because Plaintiff did not have any of the content of her communications disclosed to
18 law enforcement, nor were disclosures made pursuant to a warrant, she lacks standing to
19 bring claims on behalf of those classes of individuals. Class representatives must have
20 standing on the issues as to which they seek adjudication. *Bailey v. Patterson*, 369 U.S. 31,
21 32 (1962). A plaintiff may not seek relief for any putative class member unless he or she
22 alone can establish the requisite case or controversy. *See Simon v. E. Ky. Welfare Rights*
23 *Org.*, 426 U.S. 26, 40 n.20 (1976) (quoting *Warth v. Seldin*, 422 U.S. 490, 502 (1975))
24 (“That a suit may be a class action, however, adds nothing to the question of standing, for
25 even named plaintiffs who represent a class ‘must allege and show that they personally have
26 been injured, not that injury has been suffered by other, unidentified members of the class to

1 which they belong and which they purport to represent.”). Accordingly, to bring suit
 2 against Yahoo!, Plaintiff must show that she *personally* “has actually been injured by the
 3 defendant’s challenged conduct.” *Lee v. Am. Nat’l Ins. Co.*, 260 F.3d 997, 1001 (9th Cir.
 4 2001) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180
 5 (2000)).

6 As demonstrated by Exhibits B and C to Defendant’s first motion to dismiss,
 7 Plaintiff’s subscriber information was requested pursuant to a facially valid subpoena—not
 8 a warrant, and in accordance with the SCA, the information disclosed was non-content
 9 information. *Compare* 18 U.S.C. § 2703(a), *with* § 2703(c). Plaintiff therefore was not
 10 injured by the alleged acceptance of warrants by facsimile or by the disclosure of content.
 11 Consequently, Plaintiff may not assert any claims for improper compliance with a warrant.¹⁶
 12 Furthermore, Plaintiff’s Wiretap Act claims based on violations of 18 U.S.C. § 2511 must
 13 be dismissed, as that claim requires the disclosure of the content of communications, not
 14 merely subscriber records. *See e.g.* 18 U.S.C. § 2510(12) & 2511(2) (distinguishing
 15 between communications from subscriber records or addressing information).¹⁷

16 CONCLUSION

17 For the foregoing reasons, immunity plainly exists pursuant under the Stored
 18 Communications Act and Plaintiff’s claims cannot be cured by further amendment, the
 19 Court should grant the motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) without leave
 20 to amend.

21
 22 ¹⁶ Even if Plaintiff had standing, California law specifically allows for the acceptance of out
 23 of state warrants served by facsimile. Cal. Penal Code § 1524.2(c). Plaintiff alleges Yahoo!
 24 did not comply with these requirements because the fax cover sheet was not properly
 addressed. As is the case with all service of process defects, Yahoo! may wave those
 requirements without running afoul of the SCA.

25 ¹⁷ The Wiretap Act, 18 U.S.C. § 2520(e) provides an identical good faith defense to
 26 2707(e). As such, for the same reasons set forth above, Plaintiff’s claims under the Wiretap
 Act should also be dismissed.

1 This 13th day of January, 2011.

2 /s/ Jennifer Granick, Esq.

3 Jennifer Granick, Esq.
4 CA Bar No. 168423
5 ZWILLINGER GENETSKI LLP
6 1705 N Street, NW
7 Washington, D.C. 20036
8 Phone: (202) 296-3585
9 Fax: (202) 706-5298
10 jennifer@zwillgen.com

11 *Attorneys for Defendant Yahoo! Inc.*